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No. 10-596

# In the Supreme Court of the United States

FAYE COFFIELD, et al.,

*Petitioners*,

v.

BRIAN KEMP, in his Official Capacity as Georgia Secretary of State and Chairperson of the Georgia State Election Board,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE DEMOCRACY, COALITION FOR FREE AND OPEN ELECTIONS, and FREE & EQUAL ELECTIONS FOUNDATION IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Democracy ("CCD") is a non-partisan, non-profit 501(c)(3) organization founded in 2005 to strengthen American democracy by increasing electoral competition. CCD works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process. This case is of interest to CCD because it involves a challenge to the constitutionality of Georgia's law governing ballot access for non-major party candidates for the United States House of Representatives, which is the most restrictive in the nation.

Coalition for Free and Open Elections ("COFOE") is a non-partisan organization that works to improve the legal environment for voters and candidates who prefer to express their political views outside the Democratic and Republican Parties. Founded in 1985, COFOE currently includes the Constitution, Green, Libertarian, Socialist, and Working Families Parties. COFOE has an interest in this case because its members have been unable to place their candidates for the United States House of Representatives on Georgia's ballot in regularly-scheduled elections ever

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[1] This brief is filed with the written consent of all parties. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

since Georgia increased its ballot access requirements for that office in 1964.

The Free and Equal Elections Foundation ("Free & Equal") is a non-partisan educational organization whose mission is to provide people with the tools and information they need to make educated political decisions and participate in all areas of governance. Free & Equal believes the democratic process can function properly only when all candidates have reasonable access to the ballot. Free & Equal has an interest in this case because its sister organization, Free & Equal Inc., headed a petition drive for a candidate who was denied access to Georgia's 2010 general election ballot.

## STATEMENT

Georgia's ballot access requirements for minor party and independent congressional candidates are more restrictive than those of any other state in the nation.[2] Since Georgia amended its laws to increase

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[2] Before 1943, Georgia permitted any minor party or independent candidate to appear on the general election ballot with no petition whatsoever. In 1943, Georgia amended its law to require that independent candidates and parties that had not polled 5 percent for a particular office in the last election submit a petition signed by 5 percent of registered voters. Georgia amended its law again in 1964, to require such petitions from parties that had not polled 20 percent of the vote in the last gubernatorial election, or of the nationwide vote in the last presidential election. The 1964 amendments also required that each petition sheet be notarized, and that the petitioning candidate pay a filing fee. Finally, Georgia moved its deadline for submitting petitions from October to September. These requirements remain in effect. O.C.G.A. § 21-2-170 (2010).

those requirements in 1964, not one minor party or independent candidate for United States House of Representatives has appeared on Georgia's ballot in any regularly-scheduled election.[3] This major party monopoly over Georgia's congressional election ballot is unique in the United States. In every other state, minor party or independent congressional candidates have appeared on the ballot at least once since 1965, including at least once in the last decade.

This case involves a challenge to one aspect of the 1964 amendments to Georgia's law, brought by Faye Coffield, an independent candidate for the U.S. House, who unsuccessfully attempted to access Georgia's 2008 general election ballot ("Petitioner"). Specifically, Petitioner challenges Georgia's requirement that minor party and independent congressional candidates submit nomination petitions with signatures equal in number to 5 percent of all registered voters eligible to vote for that office in the last election. O.C.G.A. § 21-2-170 (2010). The District Court and the Eleventh Circuit Court of Appeals summarily rejected Petitioner's challenge, on the ground that this Court upheld Georgia's 5 percent requirement nearly 40 years ago. *See Jenness v. Fortson*, 403 U.S. 431 (1971). In *Jenness*, however, the Court's decision was premised on its conclusion that the 5 percent requirement does not "operate to freeze the political status quo" in Georgia. *Id.* at 438-39. That conclusion is inconsistent with the facts of this case, because no congressional candidate has complied with the 5

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[3] Georgia does not require candidates to submit nomination petitions in special elections

percent requirement in the entire time since *Jenness* was decided.

In dismissing Petitioner's challenge, the 11th Circuit suggested that perhaps no minor party or independent congressional candidates had complied with Georgia's 5 percent requirement since 1964, because none had tried. *See Coffield v. Kemp*, 599 F.3d 1276, 1277 (11th Cir. 2010). The primary purpose of this brief is to provide the Court with facts that refute such conjecture. While *Amici* agree with Petitioner that the number of candidates who unsuccessfully petitioned to access Georgia's ballot cannot be known, because no public record of such efforts exists, *Amici* nevertheless can confirm that no fewer than 10 candidates tried but failed in the 2010 election alone. *See infra* Part I.

*Amici* also submit this brief to alert the Court to a factual error in *Jenness*, which suggests that Georgia's 5 percent requirement does in fact operate to freeze the political status quo. Specifically, the Court's decision in *Jenness* was based on its conclusion that Georgia's 5 percent requirement was not as burdensome as Ohio's 15 percent requirement, which the Court had recently struck down. *See Williams v. Rhodes*, 393 U.S. 23 (1968). Georgia's law requires 5 percent of all *registered* voters, however, whereas Ohio's required 15 percent of *actual* voters in the last gubernatorial election. Because the pool of all registered voters is inevitably larger than the pool of actual voters in any election, Georgia's requirement is, in fact, more burdensome than the requirement struck down in *Williams*.

Whether or not Georgia's political status quo was frozen in 1971, when *Jenness* was decided, the failure of any minor party or independent candidate for U.S. House to comply with Georgia's 5 percent requirement since then suggests that, in the context of congressional elections, Georgia's political status quo is in fact frozen in 2010. Therefore, it was improper for the 11th Circuit to rely on *Jenness* to dispose of this case.

## SUMMARY OF ARGUMENT

This Court has made clear that no "litmus-paper test" exists for determining the constitutionality of ballot access laws. *Storer v. Brown*, 415 U.S. 724, 742 (1974). Instead, a reviewing court must consider whether or not candidates are actually able to comply with the law as it is applied in practice. *See id.* If "reasonably diligent" candidates are "only rarely" able to comply with a law, then the law is constitutionally suspect. *See id.*

In this case, the 11th Circuit erred by summarily rejecting Petitioner's challenge to Georgia's 5 percent signature requirement on the ground that this Court upheld the requirement nearly 40 years ago in *Jenness*. The 11th Circuit did not address the fact that no minor party or independent congressional candidate has complied with Georgia's 5 percent requirement in 46 years, except to suggest that perhaps such candidates have not tried. By disregarding facts indicating that Georgia's 5 percent signature requirement is unconstitutionally burdensome as applied to congressional candidates, therefore, the 11th Circuit improperly applied *Jenness* as a "litmus-paper test" to dispose of this case.

The fact that numerous candidates have tried but failed to comply with Georgia's 5 percent requirement demonstrates the 11th Circuit's error in relying on *Jenness* in this case. Contrary to the Court's conclusion in *Jenness*, which was decided in 1971, Georgia's political status quo with respect to congressional elections appears to be frozen in 2010. Furthermore, in *Jenness*, the Court mischaracterized and underestimated the burden that Georgia's 5 percent requirement imposes, which suggests that the political status quo with respect to congressional elections may have been frozen at the time when *Jenness* was decided. The failure of any minor party or independent candidate for U.S. House to comply with Georgia's 5 percent requirement since then supports that conclusion.

## ARGUMENT

### I. NUMEROUS CANDIDATES FOR U.S. HOUSE HAVE TRIED BUT FAILED TO COMPLY WITH GEORGIA'S 5 PERCENT REQUIREMENT SINCE 1964, AND NOT ONE HAS SUCCEEDED, DEMONSTRATING THE LOWER COURTS' ERROR IN RELYING ON *JENNESS* TO DISPOSE OF THIS CASE.

The 11th Circuit faulted Petitioners for failing to allege how many minor party and independent candidates for U.S. House have attempted to comply with Georgia's 5 percent requirement. *See Coffield*, 599 F.3d at 1277. The conspicuous absence of these candidates from Georgia's ballot since 1964 might simply reflect a lack of effort, the 11th Circuit reasoned. *See id. Amici* can dispel that myth. While it

is impossible to know the total number of candidates who launched unsuccessful petition drives in Georgia in the last 46 years, no fewer than 10 did in the 2010 election cycle alone – and their failure certainly was not for lack of effort.

### A. No Fewer Than Nine Independent and One Minor Party Candidates Tried But Failed to Access Georgia's Ballot in the 2010 Election.

The state of Georgia, like every other state, does not maintain any record of candidates who were denied access to its ballot. Nevertheless, based on their own advocacy on behalf of minor party and independent candidates and voters, *Amici* can confirm that the following candidates tried but failed to access Georgia's 2010 general election ballot.

Jeff Anderson, an independent candidate for U.S. House in Georgia's 11th district, planned his petition drive more than two years in advance, and collected more than 14,000 signatures in an effort to meet the 20,819 signature total mandated by the state's 5 percent requirement. *See* Richard Winger, *Georgia Independent Congressional Candidate, Denied Ballot Access, Will Pursue Strong Write-in Campaign*, BALLOT ACCESS NEWS (August 12, 2010). That would have been enough signatures to qualify for the ballot in any other U.S. House district in the nation, except those in North Carolina and possibly certain heavily populated districts in Illinois and California. *See id.* In Georgia, however, Anderson was denied access to the ballot.

Brad Bryant, the incumbent state schools Superintendent, had the weight of Governor Sonny

Perdue's support behind him, but he still could not qualify for a spot on Georgia's 2010 ballot. *See* Dorie Turner, *Bryant Won't Run for Schools Superintendent*, ASSOCIATED PRESS (July 13, 2010). The governor appointed Bryant to an interim term shortly after the deadline for partisan primary elections, forcing him to seek re-election as an independent. *See id.* Bryant collected more than 36,000 signatures in a few weeks, but fell well short of the 44,071 signatures mandated by Georgia's lesser 1 percent requirement for statewide candidates.[4] *See id.*; O.C.G.A. § 21-2-170 (2010).

Millionaire Ray Boyd spent more than $2 million on his 2010 Republican primary campaign for governor, but the party denied him ballot listing because he declined to swear a loyalty oath. *See* Associated Press, *Boyd Quits Georgia Governor's Race*, THE AUGUSTA CHRONICLE (June 27, 2010). Boyd vowed to run as an independent, and hired a private firm to launch his petition drive. *See id.* He still failed to collect the 51,320 signatures mandated by Georgia's lesser 1 percent requirement for statewide candidates. *See id.*

Keith Tomkins, an independent candidate for the Georgia State House in 2010, submitted approximately 1,950 signatures to meet the 1,806 total mandated by Georgia's 5 percent requirement, but fell short by 66 signatures. *See* Sarah Fay Campbell, *Tompkins Fails*

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[4] Although *Amici* do not argue that Georgia's 1 percent requirement for statewide candidates is necessarily unconstitutional, the failure of candidates to meet this lesser requirement demonstrates that it, too, may be unduly burdensome.

*to Qualify for Ballot*, THE NEWNAN TIMES-HERALD (August 3, 2010). Tomkins was not informed of the grounds on which his petition signatures were invalidated, but believes it was because some signatures were submitted on letter-sized paper, while others were on legal-sized paper. *See id.*

Brad Ploeger, the lone minor party nominee to submit a nomination petition in 2010, sought to run as a Libertarian Party candidate for the Georgia State House. *See* Richard Winger, *Most Georgia Independent Candidate Petitions Fail to Have Enough Valid Signatures*, BALLOT ACCESS NEWS (August 3, 2010). Ploeger submitted more than enough signatures to meet the total mandated by Georgia's 5 percent requirement, but approximately half of his petition signers were not registered in his district. The invalidation of those signatures caused Ploeger's petition to fall short. *See id.*

Four more independent state legislative candidates attempted to access Georgia's ballot in 2010: Chuck Pardue for State Senate, 23rd district; Brook Nevel for State House, 51st district; Allen Williamson for State House, 82nd district; and Kirk Howell for State House, 108th district. *See id.* Each of these candidates failed to collect the necessary signatures under Georgia's 5 percent requirement, and were denied placement on the ballot. *See id.*

Finally, Mary Norwood, an Atlanta city councilwoman who fell only 718 votes shy of winning the mayoral election in 2009, was nonetheless denied access to Georgia's 2010 ballot as an independent candidate for Chair of the Fulton County Board of Commissioners. *See* Associated Press, *Atlanta Would-*

*Be Mayor Won't Get Fulton County Spot*, WASHINGTON EXAMINER (July 13, 2010). Norwood submitted approximately 33,000 signatures to meet the 22,598 signature total mandated by Georgia's 5 percent requirement, but elections officials did not check her petitions' validity, because she paid the filing fee before close of business on the day it was due, and Georgia sets the deadline at noon. *See* Richard Winger, *Most Georgia Independent Candidate Petitions Fail to Have Enough Valid Signatures*, BALLOT ACCESS NEWS (August 3, 2010).

Many more minor party and independent candidates have attempted to access Georgia's ballot without success in prior elections. For example, five candidates of the Georgia Libertarian Party tried but failed in the 2004 general election. *See* Maggie Large, *Libertarians Meet at Macon Eatery*, THE MACON TELEGRAPH (August 29, 2005). Wayne Parker, the Libertarians' nominee for U.S. House, 11th District, likewise tried but failed to access Georgia's 2002 general election ballot. *See* Brian Long, *3rd Parties Need Not Apply: Georgia Sets High Bar on Ballot Access*, THE ATLANTA JOURNAL-COUNSTITUTION (September 30, 2002). Mr. Parker sought injunctive relief in federal court, but the federal court abstained. *See Parker v. Barnes*, No. 1:02-CV-1883-BBM (N.D. Ga. October, 8, 2002).

### B. The Failure of Any U.S. House Candidate to Comply With Georgia's 5 Percent Requirement Since 1964 Demonstrates the Lower Courts' Error in Relying on *Jenness* to Dispose of This Case.

It is a matter of settled law that reviewing courts must consider "past experience" to determine the constitutionality of ballot access laws. *Storer*, 415 U.S. at 742. If "reasonably diligent" candidates "only rarely" succeed in getting on the ballot, such laws are suspect. *Id.* Indeed, this Court has repeatedly recognized that ballot access laws which block all competition to the two major parties are unconstitutional. *See, e.g., Williams*, 393 U.S. at 32 (striking down Ohio's law because it "tends to give [the major parties] a complete monopoly"); *see also Jenness*, 403 U.S at 439; *American Party of Texas v. White*, 415 U.S. 767, 783 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 n.11 (1986); *Burdick v. Takushi*, 504 U.S. 428, 436 (1992). Georgia's 5 percent requirement plainly fails this test.

Case law relied upon by the lower courts in this very case confirms that minor party and independent candidates have been "clamoring for a place on the ballot" in Georgia for years. *Williams*, 393 U.S. at 31; *see Coffield*, 599 F.3d at 1277 (citing *Cartwright v. Barnes*, 304 F.3d 1138 (11th Cir. 2002)). In *Cartwright*, the 11th Circuit upheld Georgia's 5 percent requirement on the ground that *Jenness* "directly addressed" that requirement. *Cartwright*, 304 F.3d at 1141. For the 11th Circuit, the fact that no minor party candidate for U.S. House had ever complied with

Georgia's 5 percent requirement was immaterial. *See id.*

Nearly a decade has passed since *Cartwright* was decided, and still no minor party or independent candidate for U.S. House has overcome the 5 percent requirement to appear on Georgia's ballot. Nevertheless, in this case, the District Court concluded that Petitioner's challenge to Georgia's 5 percent requirement is "foreclosed" by *Jenness*, and the 11th Circuit concurred, observing that "the pertinent laws of Georgia have not changed materially" since *Jenness* and *Cartwright* were decided. *Coffield*, 599 F.3d at 1277. This was clear error.

The lower courts erred because they improperly applied *Jenness* as if it were a "litmus-paper test," without addressing the fact that no minor party or independent congressional candidate has been able to comply with Georgia's 5 percent requirement in the nearly 40 years since that case was decided. *See Storer*, 415 U.S. at 730. Had the 11th Circuit properly addressed such past experience, as *Storer* requires, *see id.* at 742, it could not have relied upon *Jenness* to summarily dispose of Petitioner's challenge. *Jenness* relied on the conclusion that Georgia's ballot access scheme does not operate to freeze the political status quo. *See Jenness*, 403 U.S at 438. That conclusion is inconsistent with the facts of this case. Therefore, *Jenness* should not be used to dispose of this case without proper consideration of the factual record.

## II. TO THE EXTENT THAT *JENNESS* APPLIES TO THIS CASE, IT SHOULD BE RECONSIDERED, BECAUSE THAT DECISION RESTS ON A FACTUAL PREMISE THAT IS DEMONSTRABLY FALSE.

*Jenness* also should not be relied upon to dispose of Petitioner's challenge, because *Jenness* mischaracterized and underestimated the burden imposed by Georgia's 5 percent requirement. The Court decided *Jenness* just three years after striking down Ohio's entire ballot access scheme on the ground that it effectively granted the major parties a monopoly over the electoral system. *See Williams*, 393 U.S. at 32. In *Jenness*, therefore, the Court was concerned to demonstrate that Georgia's law was not as burdensome as Ohio's. *See Jenness*, 403 U.S at 438. In fact, Georgia's signature requirement is more burdensome than Ohio's was in *Williams*.

In *Williams*, Ohio required that minor parties submit a petition with signatures equal in number to 15 percent of *actual* voters in the last gubernatorial election. *See Williams*, 393 U.S. at 25. Georgia, by contrast, requires signatures equal in number to 5 percent of all *registered* voters. *See Jenness*, 403 U.S at 432. Because the pool of actual voters in any election is inevitably smaller than the pool of all registered voters, Georgia's law actually required many more signatures than Ohio's law required. *See* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of Jenness v. Fortson*, 1 ELECTION LAW JOURNAL No. 2, 242 (2002) (attached as Appendix A).

Had Georgia applied Ohio's 15 percent requirement instead of its own 5 percent requirement, the candidate in *Jenness* would have been required to submit 68,252 signatures. *See id.* at 243. Instead, under Georgia's 5 percent requirement, the candidate needed 88,175 signatures. *See id.* Yet while the Court struck down Ohio's less burdensome signature requirement in *Williams*, it upheld Georgia's more burdensome signature requirement in *Jenness*, on the ground that Georgia's statutory scheme, unlike Ohio's, did not "operate to freeze the political status quo." *Jenness*, 403 U.S at 438.

The Court based its conclusion in *Jenness* on the fact that two candidates had recently complied with Georgia's 5 percent requirement.[5] *See id.* at 439. One candidate, however, was a Republican – 1966 gubernatorial nominee Howard Callaway – who had all the resources of a major party at his disposal. *See id.* at 439 & n.21. The other was 1968 American Independent Party presidential nominee George Wallace, the former Democratic governor of Alabama, a segregationist who enjoyed unprecedented support for a minor party candidate in the South. *See id.* at 439 & n.22. Even if these examples were sufficient to support the Court's conclusion in *Jenness*, however, they are plainly insufficient now, because not one minor party or independent candidate for U.S. House has complied with Georgia's 5 percent requirement

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[5] The Court also found that Georgia did not impose "suffocating restrictions" on the circulation of nomination petitions. *Jenness*, 403 U.S at 438. In fact, however, Georgia imposes several such restrictions, which the Court failed to address in *Jenness*. *See generally*, Winger, *The Supreme Court and the Burial of Ballot Access*, 1 ELECTION LAW JOURNAL 2 at 238-39.

since before that case was decided - a period of 46 years.

Despite the fundamental flaw in *Jenness*, the lower courts have cited that decision repeatedly to uphold burdensome ballot access laws across the nation. *See* Winger, *The Supreme Court and the Burial of Ballot Access*, 1 ELECTION LAW JOURNAL 2 at 249-52 (citing 126 such cases in state and federal courts). Meanwhile, at least two Federal Courts of Appeals have expressed confusion as to the proper standards and methods for reviewing such cases. *See, e.g., Manifold v. Blunt*, 863 F.2d 1368, 1373 n.9 (8th Cir. 1988) (recognizing "the apparent inconsistency in the standard of review applied by the Supreme Court" in ballot access cases); *Socialist Workers Party v. Eu*, 591 F.2d 1252, 1261 n.5 (9th Cir. 1978) ("The methodology of the Supreme Court...is not easily discerned" in ballot access cases). *Amici* respectfully suggest that such confusion flows from the factual error in *Jenness*, which led the Court to uphold a requirement that no congressional candidate has met in 46 years. This case presents the Court with the opportunity to correct that error, which is becoming more apparent with each passing year. *Jenness* should be reconsidered.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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